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## Questions & Answers -- Copyright Column

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## Cases of Note from page 74

serve as a market substitute for the original." *Campbell* at 588.

*Hence the clever title of this article.*

### Campbell and Paramount

**First Factor: Purpose and Character of the Use.** **Leslie Nielsen's** smirking mug is certainly transformative. It can be perceived as ridiculing **Demi's** dead serious celebration of her majestic, abundant fertility. In her deposition, **Leibovitz** would not narrow the photo's intent to a single message, but admitted that one possibility was **Demi's** "self-confidence or feeling of pride in being beautiful and pregnant." So **Paramount** is being parodic and would seem to win this one.

However, the ad was used to promote a commercial product and that works against **Paramount**. See *Campbell* at 585. **Paramount** countered this by saying the ad is not just an ad but an extension of the film. It tells the world that the film is witty and includes comments on pregnancy and parenthood.

*Curiously, if this were valid, the other pho-*

*tos should comment on Naked Gun themes as well. But the Court does not pick up on this.*

The Court found, on balance, the First Factor went to **Paramount**. It was not like *Steinberg v. Columbia Pictures Industries, Inc.*, 663 F. Supp. 706 (S.D.N.Y. 1987) where **Steinberg's** drawing was lifted to advertise a movie without any comment on the drawing.

**Second Factor: Nature of the Copyrighted Work.** **Leibovitz's** photo was heavy-duty art — a near magical recreation of a desired object — but this doesn't count for much in a parody case. **Leibovitz** wins this, but it doesn't amount to much.

**Third Factor: Amount and Substantiality of Work Used.** **Leibovitz** can't own the concept of a nude pregnant female. That, and the Pudica pose have been around since Adam delved and Eve spanned. But her artistic expression of **Demi's** body is protected. She owns the lighting, skin tone, and camera angle. See *Gentieu v. John Muller & Co.*, 712 F. Supp. 740, 742 (W.D. Mo. 1989) (protectable elements include "photographer's selection of background, lights, shading, positioning and timing").

**Paramount** went out of its way to create a match to **Leibovitz's** nude **Demi**, protuberant with her great expectations. But going beyond

what is necessary to conjure up **Leibovitz's** nude is not fatal. Once they took enough to assure identification with **Demi**, the right to take more depends on the extent to which the "overriding purpose and character" of the copy "is to parody the original," and "the likelihood that the parody may serve as a market substitute for the original." *Campbell*, 510 U.S. at 588.

**Fourth Factor: Effect of the Use on the Market for the Original.** And of course there's no way a knocked-up **Nielsen** will become a pin-up in preference to **Demi** as brooding nature. **Leibovitz** conceded that she was still the great **Leibovitz** and could sell as many nude **Demis** as she wished. She just felt deprived of a licensing fee. And she's not entitled to a fee if the **Nielsen** picture was a parody.

**Leibovitz** was really bothered by the possibility of the parody interfering with her "special relationship" with celebrities. She feared they might become reluctant to be photographed out of terror of being lampooned. But this is not harm under the Fourth Factor. It is likened to the harm of a negative book review. See *Campbell*, at 591-92; *Fisher v. Dees*, 794 F.2d 432, 437-38 (9th Cir. 1986).

And the balance favored **Paramount**. 🐼

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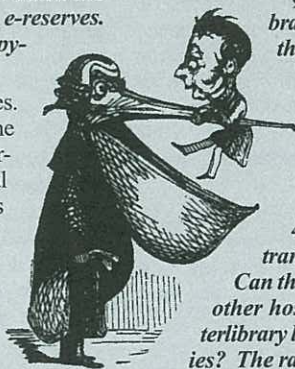
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**QUESTION:** *An instructor at the college makes extensive use of electronic reserves for her course. This term she accessed an online magazine (for which she has a personal subscription) and found the particular articles she wanted to put on e-reserves as readings. She saved them as PDF files and then asked the library to make them available on e-reserves. If the library does so, is there a copyright problem?*

**ANSWER:** More than likely, yes. If the library had a subscription to the print journal and then scanned the article, it would need to follow the usual reserve guidelines. If the articles came from the faculty member's personal subscription to a printed journal, then scanning them for reserve for one semester without permission should be allowed under the guidelines. If the articles came from a subscription to an online journal that the library maintained, then the library's license agreement for the journal would control whether copying articles in PDF format and putting them on e-reserves was permissible.

Here, however, the subscription is to an online journal and is a personal subscription. Online journals are almost always licensed products. It is highly unlikely that the click-on license which the faculty member must have executed in order to get access would permit such copying and availability. The faculty member

should be asked to print out the license from the online journal for the library in order to prove that copying and putting the articles on e-reserves from a personal subscription is permitted. If it is not, then the only alternative is for her to seek permission from the publisher.



**QUESTION:** *A hospital librarian was successful in getting the hospital group to pay for the electronic materials amendment to the Copyright Clearance Center license. This covers distribution of e-copies of journal articles within a group of 40 hospitals. It does not cover transmission outside the group.*

*Can the library transmit e-articles to other hospitals and institutions as interlibrary loans, just as it does paper copies? The rationale for this is that a practicing physician or other medical staff members are using the printed article for their own patient care, research or study so why not electronic copies since so many requestors ask that the library send the copies via email?*

**ANSWER:** The Copyright Clearance Center annual photocopy license does not cover interlibrary loan borrowing. A library would have to pay royalties for ILL borrowing separately under the CCC's Transaction Reporting Service. According to the ILL Guidelines, it is the borrower that would pay any royalties

due. The question, however, asks about lending and not borrowing. The CCC license simply does not relate to interlibrary lending at all since it deals solely with in-house copying.

The **Digital Repertory Amendment** that permits libraries operating under an annual CCC license to do electronic copying for in-house purposes, again does not relate to ILL. When borrowing an article electronically, the licensed library would need to pay royalties on the individual item since it would not be covered under the CCC license. There is a strong argument that a lending library may digitize an article in order to satisfy an ILL request, but it has nothing to do with the **Digital Repertory Amendment**. Note, however, that under section 108(d), the library may not maintain a database of scanned images to reuse since the copy must become the copy of the user.

**QUESTION:** *Two faculty members at the university teach film courses. They run evening showings of the films, followed by discussions, which are widely advertised to the public. Although this provides an opportunity for students in their classes to see the films, many people from the general public attend. No public performance rights are obtained because the faculty members claim that the performances are a fair use. They use copies of the DVDs from the library's collection for the performances, and many are recently released films ("Moulin Rouge" for example).*

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*Should the university be concerned about liability for copyright infringement?*

**ANSWER:** Absolutely! Faculty are allowed to show films in class because of the section 110(1) exemption to the Copyright Act. To qualify for this exception to the copyright holder's exclusive right of public performance, certain requirements must be met. For example, the performance must be in a classroom (broadly defined) and teachers and students be simultaneously present in the same place.

If members of the public are allowed to view the performance, then the performance loses the exemption. The House Report that accompanied the Act (H. Rep. 94-1476) says that the word "pupils" means students enrolled in the class. Thus, to have the films open to the public or even to other students on campus who are not enrolled in the class converts the performance from an exempted classroom performance to a public one for which the institution must have a license. I am surprised that the university attorneys have not put a stop to this!

**QUESTION:** *The library in a small government agency serves patrons who primarily are at remote locations. The library offers a current awareness service where patrons receive a list of citations to current journal articles of interest, mostly from journals housed in the collection. Individual patrons may request a copy of any of the cited articles to be used for non-profit research. Sometimes the same article is requested by more than one patron, so it would be a time-saver to make extra copies to keep in a folder rather than having to reproduce the article for each requestor. Does this infringe copyright?*

**ANSWER:** Under section 108 of the Copyright Act, libraries are permitted to make single copies for users under certain conditions. No multiple copying is permitted, however. Section 108(d) allows a library to make a copy of an article from a journal issue for a user. One of the conditions that the library must meet in order to qualify for this exemption is that the copy must become the property of the user. This means that the library may not keep a copy for itself. Therefore, putting extra copies in a folder for the library likely violates the statute. Another condition, found in section 108(g)(1) is that the copying may not be systematic, and it is certainly arguable that by distributing the list of citations and accepting requests for the articles, making multiple copies in anticipation of demand is systematic copying since it is hardly isolated and spontaneous.

On the other hand, it is possible that the agency has a CCC license. Many of the larger agencies do. If the agency has a license, and if the journal titles are covered under the license, then the terms of the CCC license apply. It may permit such multiple copying in anticipation of user demand, but the library should consult its CCC license to make this determination. 

## And They Were There — Reports of Meetings

### Charleston 2002 — Point/Counterpoint — Library Director/Acquisitions Librarian Perspectives from Case Western Reserve University

by **Arlene Moore Sievers** (Executive Librarian for Acquisitions and Electronic Publishing) <axs23@po.cwru.edu>  
and **Joanne Eustis** (Director University Library)

Column Editor: **Sever Bordeianu** (University of Mexico)  
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*22<sup>nd</sup> Annual Charleston Conference, Issues in Book and Serial Acquisition, "Two faces Have I: One for Books and One for Bytes,"*  
Charleston, South Carolina, October 30 - November 2, 2002

Reviewed by **Arlene Moore Sievers** and **Joanne Eustis**

**Arlene:** Two of us from **Kelvin Smith Library** at **Case Western Reserve University** attended the recent **22<sup>nd</sup> Annual Charleston Conference, Issues in Book and Serial Acquisition**. I, **Arlene Moore Sievers**, being a dyed-in-the-wool acquisitions/serials/collection development sort, always attend and listen avidly to those programs particularly which deal with my issues. These include anything about scholarly publishing, bookselling, subscription agents and the intersection of commerce and libraries. Also, anything having to do with serials and serial publishing, electronic resources in general, and approval plans is of interest to me.

**Joanne Eustis**, University Library Director here at **Case Western Reserve University**, attended her second **Charleston Conference** this year as well. Her perspective is that of an ARL library director and her interests, while intersecting with my own in many instances, focus more on the big picture issues which affect libraries and universities in general. We both agreed there was plenty for both of us at this year's **Charleston Conference**.

**Joanne:** Our perspectives on the **22<sup>nd</sup> Annual Charleston Conference** are very different. **Arlene** is actively involved as a conference participant (serving on two panels at the **22<sup>nd</sup> Conference**). In addition, as an Acquisitions Librarian and former representative of **SWETS**, she is well acquainted with almost all conference attendees. I am not only a newcomer to the **Charleston Conference**, my only involvement in the **22<sup>nd</sup> Conference** was as a member of the audience. It seems, however, what delights us both is that at the **Charleston Conference** we return to "our roots," that is a focus on library content, be it print or digital and the intricacies of building collections and assessing the value those collections add to our institutions.

The months of October and November are travel intensive times for some librarians.

Early in October the **EDUCAUSE Annual Conference** is a necessity for librarians who are interested in maintaining current awareness of information technology trends in higher education. In the middle of the month, the obligatory **Association of Research Libraries (ARL)** annual fall membership meeting takes place in Washington, DC. Therefore the prospect of traveling to a third meeting in early November is not appealing. Nevertheless, after listening to **Arlene Sievers** praise the **Charleston Conference** for several years, it was difficult to resist. After succumbing to **Arlene's** enthusiasm, it is difficult to imagine not returning to Charleston every November.

In considering why the **Charleston Conference** seemed so enchanting, I have decided that one reason is the blend of vendors, publishers, scholars, and librarians who find common ground in Charleston. Unlike **EDUCAUSE**, which has the disadvantage of being vastly larger, the **Conference** is structured in such a way so as to blend all three groups. The conference dynamic encourages audience/speaker/panel interaction in a way that is unique in my experience. Perhaps the interaction is encouraged because there is no hierarchy (important people and less important people) at the conference. Speakers and conference goers alike exchange opinions and debate issues with remarkable equanimity.

**Arlene:** The wide range of programming itself and the conference dynamic, as **Joanne** puts it so well, are what attract me every year and these led to a very successful and memorable **Charleston Conference** again in this year 2002. The panel concept interspersed with single speaker programs and several dual speaker programs worked to promote active listening rather than the involuntary zoning-out experience which can afflict even the most alert and interested conference attendee. The diversity of programming and the depth of programming on important subjects was impressive this

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